Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JESSE WOODROW SHOTTS,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Court should resolve a conflict between the Second and Eleventh Circuits, on the one hand, and the Third and District of Columbia Circuits, on the other hand, as to the meaning of the term "corruptly persuades" in the "witness tampering" statute, 18 U.S.C. § 1512(b), and whether the interpretation of the Second and Eleventh Circuits, which criminalizes "persuasion," unaccompanied by any corrupt or culpable conduct, based solely on the defendant's "improper" motive, comports with both First and Fifth Amendment principles.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 145 F.3d 1289, and is reproduced in the Appendix at App. 1. The Order denying the Petition for Rehearing is unreported and is reproduced at App. 30.

JURISDICTION OF THIS COURT

The Opinion of the Court of Appeals was filed on July 10, 1998. An Order clarifying the Judgment was filed on September 4, 1998. Appellant filed a timely petition for rehearing with suggestion for rehearing en banc; the government also filed a petition for rehearing. Both petitions were denied by Orders filed on October 2, 1998.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

18 U.S.C. § 1512(b) provides, in relevant part:

> Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to-
>
> . . .
>
> (2) cause or induce any person to-
>
> . . .
>
> (B) alter, destroy, mutilate, or conceal on object with intent to

> impair the object's integrity or availability for use in an official proceeding; ... or
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions or probation, parole, or release pending judicial proceedings;
>
> Shall be fined under this title or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

The so-called "witness tampering" statute, 18 U.S.C. § 1512(b), makes it unlawful to "corruptly persuade" another person to destroy a document intending that the document not be available for use in an official proceeding; or with the intent to prevent the communication of information to law enforcement authorities. The lower courts, which have disagreed over what the term "corruptly" means when used in a variety of obstruction of justice statutes, have grappled with how to interpret this particularly broad statute to limit its scope to conduct that is clearly unlawful.

The approach adopted by the Court of Appeals for the Eleventh Circuit in this case, agreeing in principle with the Second Circuit, and explicitly rejecting a more narrow interpretation given to the statute by the Third Circuit,

criminalizes a discussion among co-conspirators of whether they should provide the police with incriminating information, even though a participant in a conspiracy has a clear Fifth Amendment right to withhold information that might incriminate him. It permits a conviction for "persuasion," a form of First Amendment protected speech, even if the speech itself is not "corrupt" -- that is, is not itself threatening or coercive or fraudulent -- provided the speaker has a "corrupt" motive. This case provides this Court with an opportunity to resolve the conflict among the Circuits, and make clear that a statute cannot, consistent with constitutional principles, criminalize speech based solely on the motives of the speaker.

Defendant Jesse W. Shotts was a criminal defense attorney in Birmingham, Alabama, who also owned a bail bond business. After the Alabama Supreme Court promulgated a rule that precluded an attorney from having an interest in a bail bond business, Shotts closed his corporation, but continued to manage a newly formed corporation in which he no longer held any shares. A few years later, the FBI began an investigation of Jack Montgomery, a state court judge, with whom Shotts had a professional relationship.

In November, 1995, Shotts was indicted and charged with conspiracy to commit mail fraud,[1] fifteen counts of substantive mail fraud, five counts of bribery (involving Judge

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[1] The conspiracy and mail fraud counts charged two distinct schemes as a unitary scheme to defraud. The first "scheme" alleged that Shotts engaged in a scheme to obtain property -- municipal licenses to operate a bail bond business -- by filing false certifications about who owned the business. The second "scheme" alleged that Shotts obtained bail bonds signed in blank by Judge Montgomery and then obtained fees from customers of the bail bond business upon the false representation that the company would be a surety on the bonds.

Montgomery), one count of perjury before a grand jury, and five counts of "tampering" in violation of 18 U.S.C. § 1512(b).

The question raised in this petition involves the two "tampering" counts of which Shotts was convicted. The only evidence relating to those "tampering" counts came from an unindicted co-conspirator, the secretary and bookkeeper of Shotts's law firm, Kandy Kennedy.

As to Count 24, Kennedy testified about a conversation that took place after the FBI searched Judge Montgomery's home:

> Q: Were there any conversations in the office about the FBI after Mr. Montgomery's house was searched?
>
> A: Yes.
>
> Q: Was Mr. Shotts present?
>
> A: Yes.
>
> Q: Did he say anything about the FBI to you?
>
> A: I asked him about it. I asked him.
>
> Q: What did he say?
>
> A: He said just not say anything and I wasn't going to be bothered.

As to Count 22, Ms. Kennedy testified that, after the search, Shotts "instructed" another employee of the law firm (whom the government did not call to testify) to destroy bail bonds signed by Judge Montgomery. She did not actually witness the employee destroy the bonds.

Ms. Kennedy did not testify that Shotts, in either instance, engaged in any conduct that could be interpreted as intimidating or coercive, or that he attempted to bribe her or the other employee, or to bully her into giving false information. Her brief and perfunctory testimony about Shotts' response to her question and about his "instruction" to the other employee was the sum total of the evidence that the government introduced to establish that, as to Count 24, Shotts had "corruptly persuaded" an employee in order to "hinder...communication to a law enforcement officer...of information" relating to the investigation of Jack Montgomery, and, as to Count 22, that Shotts had "corruptly persuaded" an employee to "destroy" blank bail bonds with "the intent to impair [their] availability for use in an official proceeding." 18 U.S.C. § 1512(b)(2).

After a jury trial, Shotts was convicted of the conspiracy, of the mail frauds, of two counts of "tampering," and of perjury. He was acquitted of all counts of bribery and three counts of tampering were either dismissed by the government or by the court.

On appeal, the Court of Appeals for the Eleventh Circuit vacated the conspiracy, mail frauds, and perjury convictions.[2] The Court, however, upheld the two "tampering" convictions. Recognizing that there was a conflict in the Circuits on this question, the Court held that the "corruptly persuade" language of the "tampering" statute was not unconstitutionally vague or

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[2] The Court vacated the conspiracy and mail fraud convictions because, under Alabama law, a municipal license to operate a bail bond business is not property, so the mailing of an application to obtain a municipal license, or the receipt of the license in the mail, could not support a federal mail fraud conviction. (App. 15) The Court reversed the perjury conviction on the ground that Shotts's testimony before the grand jury that he did not own a bail business was "literally true." (App. 20)

overbroad, even if applied to criminalize non-culpable, non-coercive speech, provided the jury could find that the speaker acted with an "improper" purpose. (App. 22) Having thus broadly construed this already broadly written statute, the Court then held that the evidence, although "not overwhelming," was sufficient to convict Shotts of violating the statute. (App. 26)

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS OVER WHAT CONSTITUTES "CORRUPT PERSUASION" AND TO DECIDE WHETHER IT IS CONSTITUTIONAL TO CRIMINALIZE "PERSUASION" UNACCOMPANIED BY CULPABLE CONDUCT

The federal witness tampering statute prohibits a wide array of conduct ranging from the clearly unlawful – the murder, intimidation, or harassment of a witness -- to what might well be activity protected by both the First and Fifth Amendments – advice to a co-conspirator that she need not speak to the authorities. In this case, Jesse Shotts stands convicted on two counts of witness tampering -- one, for telling an employee (an unindicted co-conspirator), in response to her question, that she need not "say anything" to the FBI and she won't "be bothered," and, two, for telling another employee to destroy blank bail bonds.

The lower courts are in disagreement over whether that kind of speech, when unaccompanied by any culpable conduct, constitutes "corrupt persuasion" under 18 U.S.C. § 1512(b). Underlying that question, are two questions of constitutional import: does the First Amendment permit the criminalizing of pure speech based on the impure motives of the speaker, and

does the Fifth Amendment permit the criminalizing of a conversation between co-conspirators about whether they should provide incriminating information to the police.

The "witness tampering" statute itself does not define the term "corruptly persuade."[3] To "persuade" has been defined generally as:

> to induce one by argument, entreaty, or expostulation into a determination, decision, conclusion, belief or the like; to win over by an appeal to one's reason and feelings, as into doing or believing something; to bring oneself or another to belief, certainty, or conviction; to argue into an opinion or procedure.

Black's Law Dictionary (5th ed. 1979). See also Merriam Webster's Collegiate Dictionary (10th ed. 1994) ("to move by

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[3] The legislative history is scant. Although explaining that the language was added to the statute to expand the scope of prohibited conduct to include "culpable conduct that is not coercive or 'misleading conduct,'" H.R. Rep. No. 100-169 at 12 (1987), and, therefore, to allow prosecution under the "witness tampering" statute for conduct that some courts had held could be addressed only under the obstruction of justice statute, the Report does not explain what is meant by "culpable conduct." The Report, however, cites to two cases, United States v. Hernandez, 730 F.2d 895 (2d Cir. 1984), and United States v. King, 762 F.2d 232 (2d Cir. 1985), cert. denied, 475 U.S. 1018 (1986), as exemplifying the type of activity the amendment would cover. In one, the defendant threatened to kill a witness (Hernandez), and, in the other, the defendant tried to bribe potential witnesses (King). Both cases involved conduct that is clearly "culpable."

argument, entreaty, or expostulation to a belief, position or course of action").

Unquestionably, "persuasion" constitutes speech in its purest form. Congress could not prohibit a person from "persuading" another to change religion or political affiliation, even if the speaker's purpose was "corrupt." Congress could only prohibit that type of speech if the speech itself was corrupt -- that is, if it were accompanied by unprotected conduct -- for example, intimidation, coercion, or harassment.

The lower courts have disagreed over whether this same principle applies to the "witness tampering" statute -- whether the statute prohibits persuasion when the speaker does not act in a culpable fashion, but has a culpable intent.

In this case, the Eleventh Circuit rejected Shotts' claim that Section 1512(b), if read to criminalize the isolated comments he made to his employees, was both unconstitutionally vague[4] and fatally overbroad.[5] Instead, after acknowledging that there was a conflict in the Circuits on this issue, and aligning itself with the Second Circuit's decision in United States v. Thompson, 76 F.3d 442 (2d Cir. 1996), and rejecting the approach of the Third Circuit in United States v. Farrell, 126 F.3d 484 (3d Cir. 1997), the Eleventh Circuit held that the statute prohibits any "persuasion," that is "motivated by

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[4] A statute is unconstitutionally vague if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[5] A statute that regulates speech is overbroad if it impinges on expression protected by the First Amendment. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

an improper purpose." (App. 22-24) According to the Court, if so construed, the "corrupt persuasion" provision of the statute is neither vague nor overbroad because speech that is motivated by an "improper purpose" is "constitutionally unprotected." (App. 22)[6]

The Third Circuit has disagreed. In United States v. Farrell, 126 F.3d 484, 488 (3d Cir. 1997), the Court carefully analyzed both the language of the statute and its legislative history and determined that the statute cannot be read to prohibit "a noncoercive attempt to persuade"a co-conspirator (who enjoys a Fifth Amendment right not to provide law enforcement with incriminating information) not to talk to the authorities. As the Court reasoned, unlike the general obstruction of justice statutes, 18 U.S.C. §§ 1503 and 1505, the "witness tampering" statute has a specific intent provision: the defendant must "corruptly persuade" another person with the intent that the other person engage in certain prohibited activities. Thus, if the term "corruptly" is to be more than mere "surplusage," it must mean

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[6] Although both the Eleventh and Second Circuits have defined corruptly to mean an "improper purpose," that term is itself too vague to provide adequate notice of what type of speech is forbidden. See United States v. Poindexter, 951 F.2d 369, 378 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992), quoting Cartwright v. Maynard, 822 F.2d 1477, 1489 (10th Cir. 1987) (en banc), aff'd, 486 U.S. 356 (1988) (corrupt cannot adequately be defined as immoral since immoral is itself a vague term, and "vague terms do not suddenly become clear when they are defined by reference to other vague terms"). See also United States v. Reeves, 752 F.2d 995 (5th Cir.), cert. denied, 474 U.S. 834 (1985) (holding that "corruptly,"as used in 26 U.S.C. § 7212(a), which makes it unlawful to "corruptly endeavor" to "impede the due administration of the tax laws," is vague and overbroad if defined as "with improper motive or bad or evil purpose").

more than merely acting with the statutory intent. Id. at 490. The persuasion itself must be "corrupt" -- as when the defendant "persuades" through culpable means, for example, by intimidation or bribery.[7] See also United States v. Morrison, 98 F.3d 619, 629-30 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1279 (1997) (holding that "corruptly" in Section 1512(b) is transitive not intransitive, and refers to the manner of influencing another, not to the speaker's motives, but finding that exhorting a potential witness to violate a legal duty to testify truthfully was "corrupt").

The conflict between the broad reading of the statute adopted by the Second and Eleventh Circuits, and the more narrow interpretation of the Third Circuit, and, in principle, the District of Columbia Circuit, has very real consequences. As the law now stands, since there was no evidence that Shotts engaged in coercion, harassment, intimidation, fraud, bribery or any other form of "culpable conduct," Shotts could not be convicted in the Third Circuit for comments which carry a potential ten year sentence in the Second and Eleventh Circuits.

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[7] The conflict over what constitutes "corrupt persuasion" under Section 1512(b) is part of a larger conflict over how to construe the term "corruptly" in the context of the obstruction of justice statutes. Compare, e.g., United States v. Poindexter, 951 F.2d 369, 379 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992) (term "corruptly influencing," as used in 18 U.S.C. § 1505, even if defined to mean with an improper or immoral purpose, is "too vague to provide constitutionally adequate notice") with United States v. Brenson, 104 F.3d 1267 (11th Cir.), cert. denied, 118 S. Ct. 214 (1997) (holding that the term, as used in 18 U.S.C. § 1503, is sufficiently definite when the conduct is clearly obstructive). See also United States v. Aguilar, 515 U.S. 593, 600, n.1 (1995) (declining to address whether the term is vague or overbroad as applied in a section 1503 prosecution).

The "corrupt persuasion" provision of 18 U.S.C. § 1512(b) raises serious constitutional concerns that have not been adequately addressed by the lower courts. This Court should grant certiorari to resolve the conflict over the proper interpretation of that provision and to make clear what type of "persuasion" can be constitutionally prohibited.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

UNITED STATES of America, Plaintiff-Appellee,

v.

Jesse Woodrow SHOTTS, Defendant-Appellant.

No. 96-6634.

United States Court of Appeals,
Eleventh Circuit.

July 10, 1998.

Before BLACK, Circuit Judge, and HILL and HENDERSON, Senior Circuit Judges.

HILL, Senior Circuit Judge:

Jessee W. Shotts appeals his convictions and sentences on various counts of mail fraud and obstruction of justice. For the following reasons, we affirm in part and reverse in part.

I.

Jessee W. Shotts is a criminal defense attorney in Birmingham, Alabama. In the 1980's, he also ran a bail bond business called J & J Bonding Co. In 1990, the Alabama Supreme Court promulgated a rule that prohibited attorneys from having an interest in a bail bond business. Shotts closed J & J Bonding Co., and a new corporation called JC Bail Bonds, Inc. ("JC") was formed. Shotts' wife, Jerri Grant, was the sole shareholder. Subsequently, she transferred her shares to Donald Long, who later transferred his shares to David Pettus. At no time did Shotts own any stock in JC.

Shotts directed his secretary, Kandy Kennedy, to mail applications and money to various municipalities to obtain licenses for the business. These applications named Long as the owner of the business. Shotts also directed Kennedy to prepare the annual certification, which stated that Long was the owner of the company and that no lawyer had any interest in the company.

The new firm began to operate in the fall of 1990. On three occasions, Shotts took Long to Judge Jack Montgomery's house. Montgomery was a state district court judge in Birmingham. On each occasion, Shotts would go into Judge Montgomery's house alone and return with bonds signed by Montgomery, but otherwise blank. Shotts referred to these pre-approved bonds as "Jack" bonds. They were used as appearance bonds by JC, but without showing JC as the surety. If the defendant did not appear in court as required, JC had no liability on the bond.

In 1992, the Federal Bureau of Investigation (FBI) began an investigation into allegations of corruption on the part of Judge Montgomery and obtained a wire tap of his home phone. In late 1992, the FBI intercepted a phone call from Shotts to Judge Montgomery in which Shotts asked him to sign a bond for a prisoner in another county. When Montgomery responded that he didn't know if he could sign the bond because he had no jurisdiction in that county, Shotts said he "had 5,000 reasons to try." Montgomery then told Shotts to come to his house.

That evening, the FBI executed a search warrant on Judge Montgomery's house. They found $31,000 in the house. The next day, Montgomery resigned from office. [FN1]

> FN1. Montgomery was subsequently indicted and pled guilty, but was killed by a gunshot before he was sentenced. This case, however, concerns only allegations of mail fraud, perjury and obstruction of justice.

After the search of Montgomery's house, Shotts was called to testify before a grand jury investigating Montgomery. He was asked whether he owned JC Bail Bonds, Inc. He answered that he did not. He was also asked whether he had any interest in or was associated with a bail bond business, but he invoked his Fifth Amendment privilege and refused to answer.

In November of 1995, Shotts was indicted and charged with conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 (Count 1) and fifteen counts of substantive mail fraud, in violation of 18 U.S.C. § 1341 (Counts 2-16). The indictment also charged five counts of bribery (of Montgomery) in violation of 18 U.S.C. § 666 (Counts 17-21), and six counts of obstruction of justice-- one charging that Shotts made false statements to the grand jury in violation of 18 U.S.C. § 1623 (Count 26) and the remainder based upon witness tampering (Counts 22, 23, 24, 25 and 27), in violation of 18 U.S.C. § 1512. On February 23, 1996, a jury convicted Shotts on Counts 1-16, conspiracy to commit mail fraud and mail fraud, and three of the obstruction of justice counts. [FN2]

> FN2. The court dismissed Counts 23 and 27 upon the government's motion, and Count 25 upon motion for acquittal. The jury acquitted Shotts of Counts 17-21.

Shotts appeals each of his convictions. He challenges the legal sufficiency of the mail fraud counts and the constitutionality of the obstruction of justice counts. He also contends that the evidence was insufficient to convict him on any of the obstruction of justice counts. Finally, he asserts errors in his sentences.

II.

Shotts claims that Counts 1-17 must be reversed because the allegations of mail fraud are insufficient as a matter of law. The

mail fraud statute prohibits the use of the mails in furtherance of "a scheme to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341. In McNally v. United States, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), the Supreme Court rejected the government's argument that the statute protects intangible rights, and held that the government must allege and prove that the victim was deprived of money or property. Shortly thereafter, the Court further explained that the statute extends to intangible property, but reiterated that Section 1341 is "limited in scope to the protection of property rights." Carpenter v. United States, 484 U.S. 19, 26-27, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987) (citing McNally, 483 U.S. at 360, 107 S.Ct. 2875).

Shotts was charged in Count 1 with conspiracy to commit mail fraud. The indictment alleges that "[i]t was a part of the conspiracy that the defendant and his co-conspirators would ... cause to be delivered by mail ... business licenses, license renewal notices, [and] payments for licenses...." Counts 2- 17 allege substantive violations of mail fraud and charge that "[i]t was a part of the scheme that the business and the defendant's nominees and agents would then obtain and renew licenses from various municipalities to do business as professional bondsmen." All of the substantive mail fraud counts allege either the mailing of a bail bond license renewal notice with a check or the receipt back in the mail of the license itself.

The government's theory was that these business licenses were property as contemplated by McNally and Carpenter. During the trial, the government argued that the business licenses were property. The government requested and the court instructed the jury that "[a] business license may be considered property." Therefore, Shotts' convictions for mail fraud and conspiracy to commit mail fraud may be affirmed only if the licenses he obtained were "property" under Section 1341. [FN3] We review

de novo a challenge to the legal sufficiency of the indictment. United States v. Shenberg, 89 F.3d 1461, 1478 (11th Cir.1996).

> FN3. The government argues that, because the indictment also alleges that part of the scheme was to obtain money, Shotts' conviction may stand even if these licenses are not property under Section 1341, relying on United States v. Range, 94 F.3d 614 (11th Cir.1996). Even if Range were applicable, we could affirm Shotts' conviction only if we were able to determine with "absolute certainty" that the jury found that one of the purposes of the scheme was to obtain money. Id. at 620 (quoting United States v. Miller, 84 F.3d 1244, 1257 (10th Cir.1996)). The government concedes, however, that in this case there is a "problem" in determining what the jury found because its verdict was a general one. The government argues that this problem is overcome because "it is evident from a reading of the indictment that the main purpose of the scheme was to obtain money." (emphasis added). No authority is cited for the proposition that, if the "main" purpose of a scheme is to obtain money, we can be assured the jury found the defendant guilty of seeking to accomplish it. Nor do we think there is any such authority. A general verdict which may rest upon an insufficient legal theory must be reversed. Griffin v. United States, 502 U.S. 46, 57, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991); United States v. Martinez, 14 F.3d 543, 553 (11th Cir.1994).

This is an issue of first impression in this circuit and one on which the other circuits are divided. The majority of the circuits have held that a business license is not property and cannot support a Section 1341 mail fraud conviction. See e.g., United States v. Schwartz, 924 F.2d 410 (2d Cir.1991) (export license); United States v. Granberry, 908 F.2d 278 (8th Cir.1990) (school bus driver permits); Toulabi v. United States, 875 F.2d 122 (7th

Cir.1989) (taxi operator license); United States v. Kato, 878 F.2d 267 (9th Cir.1989) (private pilot license); United States v. Murphy, 836 F.2d 248 (6th Cir.1988) (license to conduct bingo game). Most of these courts have reasoned that a business license represents nothing more than an "expression of the government's regulatory imprimatur." Schwartz, 924 F.2d at 418. For example, the Second Circuit held that "[t]he government's power to regulate does not a fortiori endow it with a property interest in the license." Id. at 417. [FN4] On the other hand, some circuits have held that a business license is sufficient property to support a mail fraud conviction. United States v. Salvatore, 110 F.3d 1131,1140 (5th Cir.1997) (video poker license); United States v. Bucuvalas, 970 F.2d 937 (1st Cir.1992) (liquor license); United States v. Martinez, 905 F.2d 709 (3d Cir.1990) (medical license).

> FN4. Many of these courts imply that a license may be some form of property in the hands of the licensee if the license may not be revoked without due process of law. See, e.g., Murphy, 836 F.2d at 253; Granberry, 908 F.2d at 279; Kato, 878 F.2d at 269; Ferrara, 701 F.Supp. at 41.

This division among the circuits is not surprising since neither McNally nor Carpenter define the "property" protected by the mail fraud statute. Both merely teach that the term is "to be interpreted broadly," McNally, 483 U.S. at 356, 107 S.Ct. 2875, but not so broadly as to include "intangible rights." Carpenter, 484 U.S. at 25, 108 S.Ct. 316.

In Carpenter, however, the Supreme Court relied upon two of its prior opinions to hold that confidential business information is property. Id. at 26, 108 S.Ct. 316 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001- 1004, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984) and Dirks v. S.E.C., 463 U.S. 646, 653 n. 10, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983)). Both of these opinions

relied exclusively upon state law to define property. In Monsanto, the Court noted the "basic axiom that '[p]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' " 467 U.S. at 1001, 104 S.Ct. 2862 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) (quoting Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972))).

Three years later, in considering whether a cable television franchise is Section 1341 property, the Seventh Circuit held that, under Carpenter, it must look for the answer in state law. Borre v. United States, 940 F.2d 215, 219 (7th Cir.1991) ("It is logical, therefore, for this court to look to state law in determining whether a cable television franchise constitutes 'property' for purposes of the mail fraud statute"). The First Circuit agrees. Bucuvalas, 970 F.2d at 944 (noting the Supreme Court's "consistent resort to state common law and statutory law defining 'property' "). Two of the three circuits which have since held business licenses to be property have located that definition in state law. Salvatore, 110 F.3d at 1139 (Louisiana's interest in video poker license defined by its Video Poker Law); Bucuvalas, 970 F.2d at 944 (liquor license is property under both Massachusetts statutory and common law). [FN5] We too have implied in dicta that state law defines property for Section 1341 purposes. United States v. Italiano, 894 F.2d 1280, 1285 n. 6 (11th Cir.1990) ("franchises are considered property both generally and under Florida law").

> FN5. The only other circuit to hold a license to be property located that interest in federal decisional law. Martinez, 905 F.2d at 714-15 (medical license).

Resort to state law has, not surprisingly, led to directly conflicting results. For example, in the Third Circuit under

Martinez, fraud in connection with a mailed application for a medical license is a federal crime. In the First Circuit, on the other hand, such a prosecution apparently would be dismissed for failure to state an offense. United States v. Ferrara, 701 F.Supp. 39 (E.D.N.Y.) (mail fraud prosecution dismissed because state has no property interest in medical license), aff'd without opinion, 868 F.2d 1268 (1988). Similarly, one commits mail fraud in the Fifth Circuit if false statements are made in connection with a mailed application for a gambling license, Salvatore, but not in the Ninth Circuit. United States v. Dadanian, 856 F.2d 1391 (9th Cir.1988) (scheme to obtain gambling license did not affect government's interest as a property holder). Fraud in a liquor license application sustains a mail fraud conviction in the First Circuit, Bucuvalas, but apparently not in the Eleventh Circuit. Arrington v. Dickerson, 915 F.Supp. 1503, 1509 (M.D.Ala.1995) (liquor license not property of any sort in Alabama).

These inconsistencies are the result of differences in state-created property interests. What one state regards as property may not be so recognized in another. [FN6]

> FN6. For this reason, conflicting definitions of mail fraud among the various circuits may well be aggravated by conflicting definitions of mail fraud within a circuit. Whether mail fraud is committed in Texas for the mailing of a fraudulent application for a video poker license (if they had video poker) would seem to depend upon whether Texas law creates a property interest in that license. That question is not answered by Salvatore which rests upon Louisiana law.

Furthermore, the split in the circuits on this issue is due not only to differences in state law, but to differences in the licenses under review. "A state's property interest in its licenses derives at least in part from the character of the licenses themselves." Salvatore,

110 F.3d at 1141. A particular license may signify nothing more than an intent to regulate, while another type of license may signify the state's intent to participate in that industry. Id. ("video poker licenses are different than other types of licenses"). A license to drive a taxi, see Toulabi, 875 F.2d at 124, may not be a property interest in any state; a medical license may be considered property in most states. Martinez, 905 F.2d at 715 (Pennsylvania); Medical Ass'n of State of Alabama v. Shoemake, 656 So.2d 863, 867 (Ala.Civ.App.1995); Lowe v. Scott, 959 F.2d 323, 334 (1st Cir.1992) (Rhode Island); Mishler v. Nevada State Bd. of Medical Examiners, 896 F.2d 408, 409 (9th Cir.1990) (Nevada); Watts v. Burkhart, 854 F.2d 839, 842 (6th Cir.1988) (Tennessee); Keney v. Derbyshire, 718 F.2d 352 (10th Cir.1983) (New Mexico).

As state law appears to control the definition of property under Section 1341, what constitutes mail fraud apparently is susceptible to fifty different interpretations. [FN7] What constitutes mail fraud in Alabama may be insufficient to convict in Florida. Whether or not one finds such a result surprising, it is, apparently, the law. [FN8] Therefore, we look to Alabama law to determine whether a municipal bail bond license is government property in Alabama.

> FN7. One final reason for the differences among the circuits is that many of the circuits are not looking at state law to determine whether the charged offense constitutes a deprivation of property. These circuits have looked to federal law for that answer. Dadanian, 856 F.2d at 1392 (Ninth Circuit citing McNally and Carpenter to hold gambling license not property); Murphy, 836 F.2d at 253 (Sixth Circuit citing McNally to hold bingo license not property); Granberry, 908 F.2d at 280 (Eighth Circuit citing Murphy to hold school bus operator permit not property); Kato, 878 F.2d at 269 (Ninth citing Murphy and itself in Dadanian in holding

pilot's license not property); Schwartz, 924 F.2d at 417 (Second Circuit citing Kato, Murphy, Granberry and itself in a prior case not involving a license, United States v. Evans, 844 F.2d 36 (2d Cir.1988), to hold arms export license not property); and Ferrara, 701 F.Supp. at 42 (citing Evans and Murphy to hold medical license not property). It is interesting to note that all of the circuits which rely on federal decisional law conclude that there is no property in a business license; but the three circuits which do find a property right in a license, Bucuvalas (1st Cir.), Salvatore (5th Cir.), and Martinez (3d Cir.) rely on interpretations of specific state laws.

FN8. Defining a federal crime by reference to state law is an unusual feature of the mail fraud statute. Even though the crime in all circuits is use of the mail to obtain property by fraud, one who embarks upon fraud would do well to consult state law to find out if he is obtaining property. If so, it is a federal crime. If the fraud is carefully practiced in a state which defines the thing obtained as not being property, one may escape federal prosecution. We note, however, that "the requirement that statutes give fair notice cannot be used as a shield by one who is already bent on serious wrongdoing." United States v. Griffin, 589 F.2d 200, 207 (5th Cir.1979).

Shotts maintains that a business license is not property in Alabama. It is true that the Supreme Court of Alabama has held that a license to operate a bar or a package store is not property. Ott v. Everett, 420 So.2d 258, 261 (Ala.1982); Ott v. Moody, 283 Ala. 288, 216 So.2d 177 (Ala.1968); O'Bar v. Town of Rainbow City, 269 Ala. 247, 112 So.2d 790 (Ala.1959) ("There is no contract, vested right or property in a license as against the power of a state or municipality to revoke it in a proper case.") In Alabama, "[a] license to engage in the sale of intoxicants is

merely a privilege with no element of property right or vested interest of any kind." Broughton v. Alabama Alcoholic Beverage Control Bd., 348 So.2d 1059, 1060 (Ala.Civ.App.1977) (citing Moody). A federal court in Alabama has recognized that Alabama law creates no protected property interest in a liquor license. Arrington v. Dickerson, 915 F.Supp. 1503, 1509 (M.D.Ala.1995) (citing Broughton).

Neither does Alabama recognize any property interest in a salvage operator's business license. Spradlin v. Spradlin, 601 So.2d 76, 77 (Ala.1992). The Spradlin court reiterated that Alabama recognizes no property interest in any business license as against the right of the state to revoke it. Id. [FN9]

> FN9. On the other hand, Alabama does recognize a property interest in a professional license. Medical Ass'n of Alabama v. Shoemake, 656 So.2d 863, 867 (Ala.Civ.App.1995) (medical license); Averi v. Alabama State Bd. of Podiatry, 567 So.2d 343, 344 (Ala.Civ.App.1990) (medical license); Huckaby v. Alabama State Bar, 631 So.2d 855, 857 (Ala.1993) (law license). The right to practice these professions in Alabama is "constitutionally protected as a valuable property right" which cannot be deprived without due process of law. Huckaby, 631 So.2d at 857. The government apparently concedes that these licenses are not analogous to the bail bond licenses at issue in this case as it does not even cite them, much less argue that they control.

The government does not dispute that Alabama law controls the definition of property under Section 1341. Neither does the government appear to disagree that under Alabama law, no one has a property interest in these bail bond licenses prior to their issuance. [FN10] The government, however, makes the very intriguing argument that "[a]t the moment the licenses were

typed they became property within the meaning of the mail fraud statute." Because the "municipalities still controlled them" at that point, the licenses were government property [FN11] and obtaining them by fraud supports Shotts' mail fraud convictions.

> FN10. The government states, "[t]hus, even under Alabama law, licenses are indeed some form of property, at least once they are issued."
>
> FN11. Apparently the government subscribes to the theory that possession in ninetenths of the law.

The government finds support for its position in several cases which hold that even though an unissued license is not property, it may be property upon issuance. See, e.g., Murphy, 836 F.2d at 253; Granberry, 908 F.2d at 279; Kato, 878 F.2d at 269; Ferrara, 701 F.Supp. at 41. The government's contention appears to be that issuance of a bail bond license occurs at the moment it is typed.

While this is certainly a creative approach, we are not persuaded by it. First of all, none of these cases holds that even an issued license is Section 1341 property. These courts have merely noted that whatever an issued business license might be to the licensee, it is definitely not the property of the state, [FN12] either before or after issuance. Therefore, even if a license becomes property upon being typed, it would not be the state's property. Under these cases, it merely "might" become the property of the licensee.

> FN12. We are aware that these are municipal licenses, but will ignore the distinction between the state and its subdivisions for the purposes of this discussion since we believe it irrelevant to the issue of whether the business licenses are the property of the government.

Furthermore, those courts which distinguish between an issued and unissued license have premised this distinction upon the due process rights which may inure to the licensee upon issuance of the license. Toulabi, 875 F.2d at 125 ("license may be property from the driver's perspective, in the sense that he may not be compelled to surrender the entitlement except on proof of wrongdoing"); Kato, 878 F.2d at 269 ("licenses, while 'property' of the recipient once issued, are not property of the government either before or after they are issued"); Murphy, 836 F.2d at 253-54 ("the bingo license may well be 'property' once issued ... but certainly an unissued certificate of registration is not property of the State of Tennessee and once issued, it is not the property of the State of Tennessee."). The Supreme Court also recognizes this form of "property" in a license. Mackey v. Montrym, 443 U.S. 1, 10 n. 7, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979) (driver's license); Dixon v. Love, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977) (driver's license); Barry v. Barchi, 443 U.S. 55, 64 n. 11, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) (license to train horses). [FN13]

> FN13. The Fifth Circuit has expressed its impatience with the "esoteric" distinction between issued and unissued licenses. Salvatore, 110 F.3d at 1140. We do not agree, however, that the courts making this distinction "provide no justification whatsoever for making the distinction." Id. We also do not agree that the distinction is based upon the idea that a license has "great value in the hands of the licensee but an unissued license has negligible value in the hands of the government." Id. at 1140. The distinction seems quite clearly to be based upon the difference in the rights which attach to the license in the hands of the licensee.

This recognition of a form of property in a license stems from the modern theory that property is a "bundle of rights." [FN14] See United States v. Frost, 125 F.3d 346, 367 (6th Cir.1997).

These rights, however, may exist only in a particular set of hands. The right of due process prior to revocation of a license, for example, exists only in the hands of the licensee. If this is property, it is not the state's property.

> FN14. See Charles A. Reich, 73 Yale L.J. 733 (1964). On the other hand, some courts have understood McNally to direct them to the esoterica of ancient property law to divine whether a particular item is some form of property. See e.g., Bucuvalas, 970 F.2d at 945 (license is a property right analogous to fee simple determinable with a possibility of reverter); Turoff, 701 F.Supp. at 987(discussing whether a license might be an easement in gross). In fact, the Fifth Circuit, in holding a video poker license to be property in the face of specific statutory language to the contrary ("Any license issued or renewed under the provisions of this Chapter is not property ..."), did so because "when determining whether something is 'property' for purposes of the federal mail fraud statute, it is appropriate to look not only to state statutes but also to 'traditional property law.' " 110 F.3d at 1142.

These cases, therefore, do not support the government's theory that Alabama has a property interest in a bail bond license. [FN15] Even if such a license might be considered the licensee's property, from the government's perspective the license is "a promise not to interfere rather than a sliver of property." Toulabi, 875 F.2d at 125.

> FN15. The only other cases cited by the government in support of its position are Bucuvalas, Martinez and United States v. Turoff, 701 F.Supp. 981 (E.D.N.Y.1988). Turoff is inapposite because the New York City taxicab medallions held to be property were "tangible personal property" which had a substantial

market value. 701 F.Supp. at 987. The court in Turoff specifically noted that "[a] mere license, on the other hand, is nothing more than a personal, revocable privilege." Id. at 988. Bucuvalas and Martinez are inapposite because neither interprets Alabama law, much less the status of a bail bond license in Alabama.

The government has offered no other theory of how these licenses might be considered the property of Alabama. [FN16] We conclude that, under Alabama law, a municipal license to operate a bail bonds business is not government property, either before or after being typed. We hold, therefore, that neither the mailing of a fraudulent application for such a license nor the receipt in the mail of the license constitutes the federal crime of mail fraud under 18 U.S.C. § 1341. We reverse Shotts' mail fraud convictions because the jury may have convicted upon that legally insufficient theory. [FN17]

FN16. Nor has the government called to our attention any Alabama statute which creates these licenses so that we might review it to see what interest the state might have in them. Cf. Ward v. United States, 845 F.2d 1459, 1462 (7th Cir.1988) (Illinois statute creates a security interest in a bail bond which might be sufficient to support a mail fraud prosecution).

FN17. See Note 3 supra.

III.

Shotts was convicted in Count 26 of making a false material declaration before the grand jury ("perjury") in violation of 18 U.S.C. § 1623 by stating that he did not "own" a bail bonds business. He argues that this conviction must be reversed because this testimony was "literally true." We review this question of law de novo. Shenberg, 89 F.3d at 1478.

Before the grand jury, Shotts was advised he was a target, and asked the following questions:

Q: Do you own a bail bonds business?

A: No, sir.

Q: Have you been associated in some fashion with a bail bonds business?

A: I would at this time invoke my right of self-incrimination, Your Honor.

Q: All right.

A: I have a client that is a bail bonds company.

Q: Well, have you in the past either been an officer in or had an interest in a bail bonds company, any time prior to today?

A: I would respectfully decline to answer the question on the ground it might tend to incriminate me.

Shotts contends that the question regarding his "ownership" of the bail bonds business was "fundamentally ambiguous" and that, even so, his answer was "literally true." If so, Shotts' conviction for perjury is due to be reversed.

The Supreme Court has held that a perjury conviction under 18 U.S.C. § 1621 cannot be based upon a statement, however misleading or incomplete, that is the "literal truth." Bronston v. United States, 409 U.S. 352, 360, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973). An answer to a question may be non-responsive, or may be subject to conflicting interpretations, or may even be false by implication. Nevertheless, if the answer is literally true, it is not perjury. Id. at 362.

Bronston has been extended to Section 1623, under which Shotts was convicted. United States v. Abrams, 568 F.2d 411, 421 (5th Cir.1978). In Abrams, the defendant was convicted of violating Section 1623 based upon her testimony before the grand jury in response to questions about what she "would do" rather than what she had actually done. Her answers to the

poorly phrased questions were literally true. The Fifth Circuit reversed her conviction. [FN18]

> FN18. We are, of course, bound by this holding. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

Many other courts have reversed convictions based upon "literally true" answers. United States v. Boone, 951 F.2d 1526, 1536 (9th Cir.1991); United States v. Lighte, 782 F.2d 367, 372 (2d Cir.1986); United States v. Eddy, 737 F.2d 564, 567 (6th Cir.1984); United States v. Niemiec, 611 F.2d 1207, 1210 (7th Cir.1980); United States v. Tonelli, 577 F.2d 194, 198 n. 3 (3d Cir.1978); United States v. Paolicelli, 505 F.2d 971, 973 (4th Cir.1974). For example, in Eddy, the Sixth Circuit reversed a Section 1623 conviction where the defendant denied submitting an "official" college transcript and diploma to a government agency. The denial was "literally true" because the defendant had submitted falsified, not official, documents. 737 F.2d at 567-69. In Boone, the defendant denied going through certain company files and taking out documents. His conviction was reversed because the denial was literally true since the discarded documents were kept in different files. 951 F.2d at 1536. Finally, in Tonelli, the government qualified its question by defining a particular term. The defendant's answer to the question so defined was literally true, and the prosecutor made no further reference to any "other concepts" that he might have intended to be included within the question. In reversing the perjury conviction, the Third Circuit observed that "[T]he defendant could be said to have evaded the broad 'other concepts' which the prosecutor wished to probe. A charge of perjury, however, is not a substitute for careful questioning on the part of the prosecutor...." 577 F.2d at 198.

Shotts maintains that his answer, like those above, was literally true. Under Alabama law, a corporation is "owned" by its

shareholders. See American Cast Iron Pipe Co. v. Commerce & Industry In. Co., 481 So.2d 892, 896 (Ala.1985) ("In Alabama, the shareholders are the equitable owners of corporate assets, including real property."); Williams v. North Alabama Exp., 263 Ala. 581, 83 So.2d 330, 333 (1955) ("stockholders owing all the shares of stock of a corporation are the equitable owners of its assets"). See generally H. Henn & J. Alexander, Laws of Corporations at 491 (Practicing Law Institute, 1991) ("shareholders 'own' the corporation ...").

It is undisputed that Shotts never owned any of the shares of stock of the JC Bail Bonds business. His answer to the question whether he "owned" the company was literally true as a matter of both Alabama and general law. [FN19]

> FN19. Ordinarily, absent a finding of fundamental ambiguity, a reviewing court's role is quite limited. Where, however, the defendant's answer is literally true, we need not decide whether the question itself was so fundamentally ambiguous it could not sustain a perjury conviction. Nevertheless, we note that if the government is correct that, in some sense, Shotts "owned" the bail bond business, then the question was fundamentally ambiguous. The government may not send people to prison for failing to correctly guess the government's meaning. See Lighte, 782 F.2d at 374.

Furthermore, Shotts was not asked whether he had "nominees" own the bail bond business for him. When asked whether he was "associated with" or had "an interest in" a bail bonds company, he invoked his Fifth Amendment privilege not to answer. These responses indicate that Shotts was unwilling to perjure himself regarding his association with JC Bail Bonds, and permit an inference that his willingness to answer the "ownership" question was because he knew that under the law he was not the "owner" of the corporation. [FN20] See United States v. Marchisio, 344

F.2d 653, 661 (2d Cir.1965) (we may consider extrinsic evidence that demonstrates how a declarant interpreted a question).

> FN20. Indeed, had "ownership" of the business led to acquittal instead of conviction, and Shotts had testified that he was the owner of the business, the government might still have charged him with lying to the grand jury.

The government's argument is that Shotts ignores the "context" of his testimony. He was, "in fact," the owner even if he didn't own the stock. He had told others he "owned" the business. When asked before the grand jury if he owned a bail bond business, "he knew ... what was meant by the question." No authority is cited.

A perjury conviction must rest on the utterance by the accused of a false statement; it may not stand on a particular interpretation that the questioner places upon an answer. Lighte, 782 F.2d at 374 (citing Bronston, 409 U.S. at 360, 93 S.Ct. 595). The government cannot require Shotts to interpret its question in a way that is contrary to the law of Alabama, and he may not be convicted of perjury if he does not. Bronston expressly places on the questioner the burden of pinning the witness down to the specific object of the inquiry. Id. As then Chief Justice Burger wrote, "Precise questioning is imperative as a predicate for the offense of perjury." 409 U.S. at 362, 93 S.Ct. 595. "If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." Id. Any "special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." Bronston, 409 U.S. at 362, 93 S.Ct. 595.

Furthermore, the prosecutor's purpose must be to obtain the truth. Perjury, of course, thwarts that proper purpose. It must

not be the prosecutor's purpose, however, to obtain perjury, thus avoiding more precise questions which might rectify the apparent perjury.

Under these circumstances, we reverse Shotts' conviction for making a false statement to the grand jury. Even if Shotts' answer was evasive, nonresponsive, intentionally misleading and arguably false, it was literally true and cannot support a conviction under Section 1623.

IV.

Shotts appeals his conviction on Count 24 of the indictment which charges that he violated 18 U.S.C. § 1512(b)(3). This section makes it a crime to:

> knowingly use[ ] intimidation or physical force, threaten [ ], or corruptly persuade [ ] another person, or attempt to do so ... with intent to ... hinder, delay or prevent the communication to a law enforcement officer ... of information relating to the commission or possible commission of a Federal offense....

The indictment alleges that Shotts committed the offense by "corruptly persudad[ing] and attempt[ing] to corruptly persuade an employee of his law office to not tell anything to law enforcement agents investigating Jack Montgomery's activities." Shotts asserts that his conviction on this count must be reversed because the "corruptly persuade" language of Section 1512(b) is unconstitutionally vague and overbroad, and also because the government did not prove the charged crime.

The constitutional claim is one of first impression in this circuit, and we review it de novo. United States v. Paradies, 98 F.3d 1266, 1282 (11th Cir.1996). In reviewing the sufficiency of the evidence, we construe it in the light most favorable to the government, United States v. Tapia, 59 F.3d 1137 (11th Cir.1995), resolving all questions of reasonable inference and

credibility in the government's favor. United States v. Lyons, 53 F.3d 1198 (11th Cir.1995).

Shotts' constitutional attack on Section 1512(b) relies on United States v. Poindexter, 951 F.2d 369, 378 (D.C.Cir.1991). Poindexter had been President Reagan's National Security Advisor. He was accused of lying during the course of a congressional investigation of the Iran-Contra affair and charged under 18 U.S.C. § 1505 which prohibits the making of a false statement to the Congress. The District of Columbia Circuit reversed his conviction, holding that the term "corruptly" as used in Section 1505 was unconstitutionally vague as applied to Poindexter's actions. The court reasoned that the term was so imprecise that "men of common intelligence must necessarily guess at its meaning and differ on its application." Id. at 378.

Shotts urges us to extend the Poindexter view of Section 1505's "corruptly" to Section 1512(b). We have recently declined a similar invitation. United States v. Brenson, 104 F.3d 1267 (11th Cir.1997). In Brenson, the defendant urged us to extend Poindexter to 18 U.S.C. § 1503(a), the omnibus clause of the federal obstruction-of-justice statute, which makes it a crime to "corruptly" endeavor to obstruct the due administration of justice. We refused, holding that Section 1505 and 1503 are too materially different for the construction of one to guide the construction of the other, and that Poindexter is limited to the specific illegal conduct charged in that case. [FN21] Id. at 1280.

> FN21. The challenge in Brenson was to Section 1503(a) as applied in that case. The Fifth Circuit, in binding precedent, had already upheld the use of "corruptly" in Section 1503 against a facial attack. United States v. Howard, 569 F.2d 1331, 1337 n. 9 (5th Cir.1978).

We again decline to extend Poindexter to another section of the obstruction-of-justice statutes. We continue to believe that

Poindexter must be read narrowly, and not as a broad indictment of the use of "corruptly" in the various obstruction-of-justice statutes. [FN22]

> FN22. In fact, the District of Columbia Circuit itself has avoided extending its interpretation of Section 1505 to Section 1512(b). United States v. Morrison, 98 F.3d 619, 629 (D.C.Cir.1996). In upholding Morrison's conviction against the claim that the "corrupt" language in Section 1512(b) is unconstitutionally vague, the court held, instead, that the evidence against him was sufficient to establish that he had persuaded another to violate a legal duty, which, even under Poindexter, satisfies the "corrupt"element of these statutes. Id.

On the contrary, we agree with the Second Circuit that "corrupt" as used in Section of 1512(b) is neither unconstitutionally overbroad or vague. United States v. Thompson, 76 F.3d 442 (2d Cir.1996). In Thompson, the Second Circuit rejected the argument, also advanced here by Shotts, that Section 1512(b) criminalizes persuasion and is, therefore, an impermissible regulation of protected speech. The court noted that Section 1512(b) does not prohibit all persuasion, but only that which is "corrupt." By targeting only such persuasion as is "corrupt," Section 1512(b) clearly limits only constitutionally unprotected speech, and is not, therefore, overbroad. Id. at 452.

Thompson also rejected Shotts' argument that Section 1512(b) is unconstitutionally vague. The Second Circuit noted that the same language in Section 1503(a), the omnibus obstruction-of-justice provision, has long been upheld as meaning with an "improper purpose." See e.g., United States v. Cintolo, 818 F.2d 980, 990-91 (1st Cir.1987); United States v. Rasheed, 663 F.2d 843, 852 (9th Cir.1981); United States v. Fasolino, 586 F.2d 939, 941 (2d Cir.1978); Martin v. United States, 166 F.2d 76, 79 (4th Cir.1948). So defined, "corrupt" is

a scienter requirement which provides adequate notice of what conduct is proscribed. Id. (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)). Section 1512(b), concluded the Second Circuit, is not unconstitutionally vague because it forbids only persuasion with an improper purpose.

We are aware that a majority of a panel of the Third Circuit has declined to follow Thompson. United States v. Farrell, 126 F.3d 484 (3d Cir.1997). The majority viewed the application of Section 1503's definition of "corrupt" to Section 1512(b) to be inappropriate because "corruptly" provides the only intent element of Section 1503, while Section 1512 contains explicit intent elements in addition to the term "corruptly." Id. at 489-90. "Thus, because the 'improper purposes' that justify the application of § 1512(b) are already expressly described in the statute, construing 'corruptly' to mean merely 'for an improper purpose' (including those described in the statute) renders the term surplusage, a result that we have been admonished to avoid." Id. (citing Ratzlaf v. United States, 510 U.S. 135, 141, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994)). The majority concluded that "more culpability is required [to violate Section 1512(b)] than that involved in the act of attempting to discourage disclosure in order to hinder an investigation." Id. at 489.

This conclusion drew a strong dissent, however, which noted that both the legislative history of Section 1512 and prior decisions support the Second Circuit's contrary position in Thompson. Id. at 492 (Campbell, J. dissenting). Section 1512's "corrupt persuasion" language was added by Congress in 1988. [FN23] Senator Biden, one of the drafters of the 1988 Amendments, stated at the time that the intention was "merely to include in section 1512 the same protection of witnesses from noncoercive influence that was (and is) found in section 1503." Id. The "motivated by an improper purpose" definition of

"corrupt" in Section 1512(b), then, is correctly informed by Section 1503's long-standing interpretation.

> FN23. The amendment appeared in the Anti-Drug Abuse Act of 1988, Pub.L. No. 100-690, 102 Stat. 4181.

Furthermore, the scienter role played by "corruptly" is not redundant, according to the dissent, because "not all actions taken with the intent to hinder or obstruct justice necessarily violate § 1503 or § 1512." Id. at 493. For example, Section 1512 does not prohibit constitutionally protected speech, even if such conduct has the effect of hindering an investigation. Id. (citing Thompson, 76 F.3d at 452).

We believe that the Second Circuit and the dissent in Farrell have the better reasoned position on this issue. It is reasonable to attribute to the "corruptly persuade" language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a), i.e., motivated by an improper purpose. We are unwilling to follow the Third Circuit's lead in imposing a requirement for an additional level of culpability on Section 1512(b) in the absence of any indication that Congress so intended and in the face of persuasive evidence that it did not.

By prohibiting only that persuasion which has an improper purpose, Section 1512(b) does not impermissibly limit protected speech, and provides adequate notice that such persuasion is proscribed. Therefore, we hold that the term "corruptly" as used in 18 U.S.C. § 1512(b) is neither unconstitutionally broad nor vague. [FN24]

> FN24. We have also upheld the use of the term "corruptly" in 18 U.S.C. § 7212(a) against a vagueness attack. United States v. Popkin, 943 F.2d 1535 (11th Cir.1991). In Popkin, we reached the conclusion that

> "corruptly" is used for the purpose of " 'forbidding those acts done with the intent to secure an unlawful benefit either for oneself or for another.' " Id. at 1540 (quoting United States v. Reeves, 752 F.2d 995 (5th Cir.1985)). Thus defined, we held the term "gives clear notice of the breadth of activities that are proscribed." Id.

Having upheld Section 1512 against Shotts' constitutional attack, we turn now to Shotts' contention that the government did not present sufficient evidence that he corruptly persuaded his secretary, Kandy Kennedy, not to talk to law enforcement agents investigating Montgomery. The evidence offered by the government in support of this charge was the following testimony by Kennedy:

Q: Were there any conversations in the office about the FBI after Mr. Montgomery's house was searched?
A: Yes.
Q: Was Mr. Shotts present?
A: Yes
Q: Did he say anything about the FBI to you?
A: I asked him about it. I asked him.
Q: What did he say?
A: He said just not say anything and I wasn't going to be bothered.

Shotts asserts that this testimony proves only that Kennedy asked Shotts about talking to the FBI and that he observed that if she did not talk to the FBI, she would not be bothered. He maintains that the testimony is insufficient to prove that he threatened or intimidated her, offered her any inducement, or persuaded her in any way not to talk to the FBI.

The government argues that Shotts' use of the term "bother" could have included the possibility of Kennedy's being prosecuted and jailed for her involvement with the bail bond business. In this context, the government contends that Shotts'

comment was an attempt to frighten Kennedy into not talking to the FBI.

The jury was correctly charged that they must find that Shotts acted "knowingly and dishonestly with the specific intent to subvert or undermine the integrity or truth-seeking ability of an investigation by a federal law enforcement officer." The jury heard Kennedy's testimony. While not overwhelming, the jury could reasonably have inferred from this testimony that Shotts was attempting with an improper motive to persuade Kennedy not to talk to the FBI. There was sufficient evidence from which the jury has determined the facts. Therefore, we affirm Shotts' conviction on this count.

V.

Shotts was convicted in Count 22 of instructing his employee, Larry Eddy, to destroy "Jack bonds" in violation of 18 U.S.C. § 1512(b)(2). This section makes is a crime to "corruptly persuade" someone to destroy evidence with the intent to impair its availability for use in an official proceeding.

Shotts has two complaints about his conviction on this count. [FN25] First, he asserts that there was insufficient evidence that the bonds were actually destroyed, and second, that the indictment is deficient because it did not allege the official proceeding in which the destroyed evidence was to be used.

> FN25. We have dealt with Shotts' constitutional challenge to this conviction based upon the alleged vagueness of Section 1512(b)'s "corruptly persuade" language. See Section IV. above.

Larry Eddy did not testify at trial. The evidence on this count was in the testimony of Kandy Kennedy. She testified that after Montgomery's house was searched, the following took place:

Q: What if anything did he say about what had happened.
A: Nothing. We just took the Jack Bonds out of my desk drawer and they were taken away and destroyed.
Q: Who is "we?"
A: I took them out. I either handed them to Jesse or Larry Eddy but Larry Eddy was instructed to destroy them.
Q: Who instructed Larry Eddy to destroy the Jack bonds?
A: Jesse Shotts.

The government offered no further proof that the bonds were actually destroyed. The jury was instructed that it must find that Shotts corruptly persuaded and caused Eddy to destroy the bonds. Shotts contends that the jury was required to find that Eddy actually destroyed the bonds, and that Kennedy's testimony was insufficient to establish this fact. We review these contentions de novo. United States v. Waymer, 55 F.3d 564, 570 (11th Cir.1995).

Neither party has cited any authority to us regarding whether the statute requires that the evidence actually be destroyed. Even assuming that the statute requires such an event to occur, however, Kennedy's testimony is sufficient proof that it did. Kennedy's testimony was that she took the bonds out of her desk drawer, she handed them to "Jesse" or to Eddy, Shotts instructed Eddy to destroy them, and they were "taken away and destroyed." The jury was instructed that they must find that Shotts intended to cause a person to destroy the bonds. Kennedy's testimony can reasonably support that inference. The jury must have drawn this inference because they convicted Shotts on this count. We find no merit to this claim.

Neither are we persuaded that this count is legally insufficient for failure to identify the official proceeding at which the evidence would have been presented. See United States v. Murphy, 762 F.2d 1151, 1153 (1st Cir.1985) (failure to identify in any way the official proceeding did not sufficiently apprize

defendants of charges). Count 22 realleges the Introduction to the indictment. Paragraphs five through seven of the Introduction describe the FBI's investigation and the federal grand jury proceedings before which Jack Montgomery and Shotts were called to testify. Such allegations meet the requirements of Murphy.

VI.

Shotts' convictions were divided into two groups by the Presentence Report and subsequently by the district court at sentencing. The first group contained the convictions on the mail fraud counts and the perjury count. These sentences must be set aside because we have reversed Shotts' convictions on these counts.

The second group contained Shotts' convictions on Counts 24 and 26, the obstruction of justice counts, which we affirm. Shotts' final argument on appeal is that his sentence on these counts was incorrectly calculated under the Sentencing Table. An incorrect calculation under the Sentencing Table is reviewed as an incorrect application of the Sentencing Guidelines. Williams v. United States, 503 U.S. 193, 201, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992). This court reviews de novo the district court's interpretation and application of the guidelines. United States v. Zapata, 139 F.3d 1355, 1357 (11th Cir.1998).

The obstruction of justice counts had an adjusted offense level of 14. With a criminal history category I, the guideline range for an offense level of 14 is 15-21 months. The district court imposed a sixty-month sentence on these counts, to run concurrently with the sixty-month sentence imposed on the separately grouped mail fraud counts. [FN26] Shotts contends that this sentence was erroneous as a matter of law and must be vacated. [FN27]

FN26. The district court rejected any upward departure that might explain the sentence.

FN27. We consider sentence objections raised for the first time on appeal only under the plain error doctrine to avoid manifest injustice. United States v. Hansley, 54 F.3d 709, 715 (11th Cir.1995).

The government argues that because Shotts was convicted on multiple counts, the district court looked to and correctly sentenced under Sentencing Guideline Section § 5G1.2. The government concedes, however that "If these were the only two crimes on which the defendant was convicted, his argument may have some merit." Because we have reversed Shotts' mail fraud and perjury convictions, he stands now convicted of only these two obstruction of justice counts. Accordingly, we shall vacate his sentence on these two counts and remand for re-sentencing on them.

VII.

Counts 1 through 17 of the indictment are insufficient as a matter of law because they allege that Shotts deprived Alabama of its property in the form of a bail bond license and under Alabama law, such license is not property. Count 26 must be reversed because Shotts' alleged false statement to the grand jury was literally true and cannot form the basis for a perjury conviction. Counts 22 and 24 are neither legally nor constitutionally deficient, and the proof on these counts was sufficient to sustain Shotts' convictions on them.

Accordingly, the convictions on Counts 1 through 17 are VACATED and REMANDED. The conviction on Count 26 is REVERSED. The convictions on Counts 22 and 24 are AFFIRMED, but the sentences on these two counts are VACATED and the case is REMANDED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-6634

D. C. Docket No. CR-95-PT-310-S

Filed
U.S. Court of Appeals
Eleventh Circuit
Oct 02 1998
Thomas K. Kahn
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE WOODROW SHOTTS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITIONS FOR REHEARING
(U.S. v. Shotts, 145 F.3d 1289, 11th Cir. 1998).

Before BLACK, Circuit Judge, and HILL and HENDERSON, Senior Circuit Judges.

PER CURIAM:

This case is before the court upon petitions for rehearing filed by both Jesse W. Shotts and by the United States of America. Each party raises certain issues with respect to our opinion in *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998). The only issue which we believe merits comment is the government's contention that Shotts may be retried on Counts 1-17 which charge him with conspiracy to commit and the substantive offense of mail fraud.

To sustain a conviction for mail fraud, the government must prove a scheme to obtain money or property by fraud, and that the defendant caused the use of the mails in furtherance of that scheme. *United States v. Brown*, 79 F.3d 1550, 1557 (11th Cir. 1996). In this case, the government alleged a scheme both (1) to obtain money by defrauding the customers of a bail bond business, and (2) to obtain property by fraudulently obtaining business licenses from various municipalities of the State of Alabama. We vacated Shotts' conviction because we determined that under Alabama law a business license is not property and his conviction may have rested on that legally insufficient allegation. A general verdict where one of the possible bases of conviction is legally inadequate must be set aside. *Griffin v. United States*, 502 U.S. 52 (1991); *Yates v. United States*, 354 U.S. 298 (1957).

Shotts, of course, may not be retried for mail fraud on the legally insufficient ground that he obtained property, the business licenses, by fraud. He might, however, be subject to retrial on the government's allegation in Counts 1-17 that he obtained money by fraudulent use of the mails or conspired to do so. "[T]he protection of the double jeopardy clause by its own terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325 (1984). A reversal for legal error is not a termination of jeopardy. *United States v. Miller*,

952 F.2d 866, 872 (5th Cir. 1992). A defendant whose conviction is reversed due to legal error may be retried on those charges. *Montana v. Hall*, 481 U.S. 400 (1987).

Shotts may not be retried, however, if there was insufficient evidence in this trial that he obtained money by fraudulent use of the mails. *Burks v. United States*, 437 U.S. 1 (1978). He claims that there was no allegation nor any evidence which would support a conclusion that he used the mails in furtherance of a scheme to obtain money fraudulently from the bail bond customers. While application for and receipt of the business licenses by mail may not support the government's claim that Shotts used the mails to obtain money by fraud, there may be other evidence to support such a conclusion. Whether there was such evidence and whether it was sufficient to support this verdict such that Shotts may be retried on the legally sufficient allegations contained in Counts 1-17 is an issue that was neither briefed nor adequately argued on appeal, and we shall not undertake a review of this record *sua sponte*.

It is for this reason that we granted the government's motion to clarify our judgment on appeal. On remand, the district court may determine whether the evidence was sufficient to permit retrial on the government's allegations that Shotts obtained money by fraudulent use of the mails or conspired to do so.

With the foregoing explanation, the petitions for rehearing are denied.

ENTERED FOR THE COURT:

/s/ James C. Hill
SENIOR JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-6634

D. C. Docket No. CR-95-PT-310-S

Filed
U.S. Court of Appeals
Eleventh Circuit
Oct 02 1998
Thomas K. Kahn
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE WOODROW SHOTTS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

ON SUGGESTION OF REHEARING EN BANC
(U.S. v. Shotts, 145 F.3d 1289, 11th Cir. 1998).

Before BLACK, Circuit Judge, and HILL and HENDERSON, Senior Circuit Judges.

No member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
SENIOR JUDGE

Supreme Court, U.S.
FILED
JAN 20 1999
CLERK

(2)

No. 98-837

In the Supreme Court of the United States

OCTOBER TERM, 1998

JESSE WOODROW SHOTTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions for witness tampering, in violation of 18 U.S.C. 1512(b).

2. Whether the phrase "corruptly persuades" in Section 1512(b) is unconstitutionally vague or overbroad.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-837

JESSE WOODROW SHOTTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 145 F.3d 1289. The order of the court of appeals denying petitions for rehearing (Pet. App. 30-32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1998. A petition for rehearing was denied on October 2, 1998. The petition for a writ of certiorari was filed on November 19, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioner

was convicted on one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371; 15 counts of mail fraud, in violation of 18 U.S.C. 1341; one count of making false statements to a grand jury, in violation of 18 U.S.C. 1623; and two counts of witness tampering, in violation of 18 U.S.C. 1512(b). Pet. App. 3. The district court sentenced petitioner to concurrent terms of 60 months' imprisonment on the conspiracy, mail fraud, and false statement counts, and 60 months' imprisonment on the witness tampering counts. The court also fined petitioner $10,000 and ordered him to pay $14,000 in restitution. Pet. C.A. Br. 3. The court of appeals vacated and remanded petitioner's convictions for conspiracy and mail fraud, reversed his false statement conviction, and affirmed his convictions for witness tampering. Pet. App. 1-29.

1. During the 1980s, petitioner, an attorney in Birmingham, Alabama, operated a bail bond business known as J & J Bonding Co. In 1990, after the Alabama Supreme Court promulgated a rule that prohibited attorneys from having an interest in a bail bond business, petitioner closed J & J Bonding Co. and formed a new bail bond company called JC Bail Bonds, Inc. (JC), listing his wife as the incorporator. Stock certificates for the new corporation were issued in the name of petitioner's wife; she subsequently transferred them to Donald Long, whom petitioner had hired to run the bail bond business. Petitioner directed his secretary, Kandy Kennedy, to mail applications for licenses for the business to various municipalities. The applications named Long as the owner of the bail bond business. Petitioner also directed Kennedy to prepare a required certification stating that Long was the owner of the business and that no attorney had any interest in the company. Pet. App. 1-2; Gov't C.A. Br. 2-6.

After the new business began to operate, petitioner repeatedly went to the home of Jack Montgomery, a state district court judge, where he obtained appearance bonds that were signed by the judge but were otherwise blank. Petitioner referred to these pre-approved bonds as "Jack" bonds. The bonds were used as appearance bonds by JC, but without showing JC as the surety. If the defendant did not appear in court as required, JC had no liability on the bond. Pet. App. 2; Gov't C.A. Br. 7-8.

In 1992, as part of an investigation into allegations of corruption on the part of Judge Montgomery, the Federal Bureau of Investigation (FBI) placed a wiretap on the judge's home telephone. FBI agents intercepted a telephone call from petitioner to the judge and heard petitioner ask the judge to sign a bond for a prisoner in another county. When Judge Montgomery hesitated, noting that he lacked jurisdiction in that county, petitioner said that he "had 5,000 reasons to try." The judge then told petitioner to come to his house. FBI agents executed a search warrant at Judge Montgomery's house that evening and found $31,000 in cash. Pet. App. 2; Gov't C.A. Br. 11-12.

After the search of Judge Montgomery's house, Kennedy asked petitioner about the FBI investigation. Petitioner told Kennedy to "just not say anything and [she] wasn't going to be bothered." Petitioner also directed another employee, Larry Eddy, to destroy the remaining "Jack" bonds. Pet. App. 25-27; Gov't C.A. Br. 12-13.

2. Petitioner was indicted in the United States District Court for the Northern District of Alabama and charged with one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371; 15 counts of mail fraud, in violation of 18 U.S.C. 1341; five counts of

bribery, in violation of 18 U.S.C. 666; five counts of witness tampering, in violation of 18 U.S.C. 1512(b); and one count of making false statements before a grand jury, in violation of 18 U.S.C. 1623. Pet. App. 3. Following a jury trial, petitioner was convicted on the mail fraud conspiracy and substantive mail fraud counts, the false statements count, and two of the witness tampering counts. The district court dismissed the remaining witness tampering counts, and the jury acquitted petitioner on the bribery counts. *Ibid.*

3. The court of appeals affirmed petitioner's witness tampering convictions, reversed his other convictions, and remanded for resentencing.[1] Pet. App. 1-29. The court rejected petitioner's claim that his convictions on the witness tampering counts should be reversed because the "corruptly persuades" language of 18 U.S.C. 1512(b) is unconstitutionally overbroad and vague.[2] Pet.

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[1] The court reversed petitioner's mail fraud conspiracy and substantive mail fraud convictions, which were based in part on allegations that petitioner fraudulently obtained licenses to operate a bail bonds business from Alabama municipalities, because it concluded that such licenses were not property under Alabama law. Pet. App. 3-15; see *id.* at 31 (order denying petitions for rehearing). The court also reversed petitioner's false statement conviction, holding that his testimony before the grand jury was "literally true" and therefore could not support a conviction under 18 U.S.C. 1623. Pet. App. 15-20.

[2] 18 U.S.C. 1512(b) provides:

> Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to * * * cause or induce any person to * * * alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; [or with intent to] hinder, delay, or prevent the communication to a law enforcement officer or

App. 20-25. By prohibiting only persuasion that is "corrupt," the court reasoned, "Section 1512(b) clearly limits only constitutionally unprotected speech, and is not, therefore, overbroad." *Id.* at 22 (citing *United States* v. *Thompson*, 76 F.3d 442 (2d Cir. 1996)); see *id.* at 24 ("Section 1512 does not prohibit constitutionally protected speech, even if such conduct has the effect of hindering an investigation").

The court of appeals also rejected petitioner's vagueness claim, noting that the term "corruptly" in the omnibus obstruction-of-justice provision of 18 U.S.C. 1503(a) had "long been upheld as meaning with an 'improper purpose.'" Pet. App. 22. In accord with the Second Circuit's decision in *Thompson*, the court of appeals held that "[i]t is reasonable to attribute to the 'corruptly persuade' language in Section 1512(b), the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a), i.e., motivated by an improper purpose."[3] *Id.* at 24. "So defined," the court held, "'corrupt' is a scienter requirement which provides adequate notice of what

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judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than ten years, or both.

[3] The court also noted that the "corruptly persuades" language of 18 U.S.C. 1512 was added by Congress in 1988. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181. "Senator Biden, one of the drafters of the 1988 Amendments, stated at the time that the intention was 'merely to include in section 1512 the same protection of witnesses from noncoercive influence that was (and is) found in section 1503.'" Pet. App. 23; see 134 Cong. Rec. S17324 (daily ed. Oct. 21, 1988) (statement of Sen. Biden).

conduct is proscribed." *Id.* at 22-23 (citing *Thompson*, 76 F.3d at 452).[4]

The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence to support his witness tampering convictions. Pet. App. 25-28. In one count, petitioner was charged with violating Section 1512(b)(3) by telling Kennedy to "just not say anything and [she would not] be bothered." *Id.* at 25. The court of appeals noted the government's argument that petitioner's "use of the term 'bother' could have included the possibility of Kennedy's being prosecuted and jailed for her involvement with the bail bond business" and that, therefore, petitioner's "comment was an attempt to frighten Kennedy into not talking to the FBI." *Id.* at 25-26. The court also explained that the jury at petitioner's trial had been instructed correctly that it must find that petitioner acted "knowingly and dishonestly with the specific intent to subvert or undermine the integrity or truth-seeking ability of an investigation by a federal law enforcement officer." *Id.* at 26. Accordingly, the court held that the jury could reasonably have inferred from Kennedy's testimony that petitioner "was attempting with an improper motive to persuade Kennedy not to talk to the FBI." *Ibid.*

In the second witness tampering count on which petitioner was convicted, he was charged with violating Section 1512(b)(2) by instructing Eddy to destroy

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[4] With respect to the purely statutory question of whether the understanding of the term "corruptly" in 18 U.S.C. 1503(a) informs the proper interpretation of "corruptly" in Section 1512(b), the court acknowledged that "a majority of a panel of the Third Circuit" had refused to follow *Thompson*. Pet. App. 23 (citing *United States* v. *Farrell*, 126 F.3d 484 (3d Cir. 1997)). The court of appeals nevertheless concluded that "the Second Circuit and the dissent in *Farrell* have the better reasoned position on this issue." *Id.* at 24.

"Jack" bonds in order to "impair [the bonds'] availability for use in an official proceeding." Pet. App. 26. With respect to that count, the court of appeals rejected petitioner's claim that the government failed to prove that the "Jack" bonds actually were destroyed. The court found that "[e]ven assuming that the statute requires such an event to occur, * * * Kennedy's testimony is sufficient proof that it did." *Id.* at 26-27.

ARGUMENT

1. Petitioner contends (Pet. 9-10) that this Court should grant certiorari because the court of appeals' decision conflicts with the Third Circuit's opinion in *United States* v. *Farrell*, 126 F.3d 484 (1997), on the question of the proper meaning of the phrase "corruptly persuades" in 18 U.S.C. 1512(b). Petitioner claims that, under the Third Circuit's interpretation of that statute, the evidence was insufficient to support his convictions. Even if the court of appeals' rationale is in tension with the decision in *Farrell*, the holding in petitioner's case is correct, and the narrow area of disagreement does not at present warrant this Court's intervention.

In *Farrell*, the Third Circuit rejected the view that the "corruptly persuades" clause of Section 1512(b) proscribes all persuasion that is motivated by an improper purpose. 126 F.3d at 489-490. As the court of appeals in petitioner's case explained, however, the legislative history indicates that the "corruptly persuades" language was added to Section 1512(b) to provide witnesses with the same protection found in 18 U.S.C. 1503. Pet. App. 23; see *Farrell*, 126 F.3d at 492 (Campbell, J., dissenting). Section 1503's use of the term "corruptly," in turn, has long been understood to mean "that the government must prove that the defendant's [conduct was] *motivated by an improper purpose.*"

United States v. *Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (emphasis added) (citing *United States* v. *Fasolino*, 586 F.2d 939, 941 (2d Cir. 1978), and *United States* v. *Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982)). The court of appeals in this case thus correctly interpreted Section 1512(b)'s "corruptly persuades" clause as having "the same well-established meaning already attributed by the courts to the comparable language in Section 1503(a), i.e., motivated by an improper purpose." Pet. App. 24.[5]

To the extent the court of appeals' reasoning in affirming petitioner's conviction for corruptly persuading Kennedy not to talk to the FBI conflicts with *Farrell*, that disagreement does not warrant this Court's intervention at present.[6] The Third Circuit's decision in *Farrell* is a limited one. The court held that the defendant's conduct in that case—attempting to persuade a co-conspirator to withhold information from federal investigators—did not violate the statute be-

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[5] Contrary to petitioner's suggestion (Pet. 9), interpreting Section 1512(b)'s use of the term "corruptly" to mean that the persuasion must be motivated by an improper purpose does not make the term redundant with the statute's requirement that the defendant have the intent to "hinder, delay, or prevent" the communication of the relevant information to a law enforcement officer or judge. Not all actions taken to hinder an investigation violate Section 1512(b); the action must also be "corrupt"—*i.e.*, motivated by an improper purpose. See *United States* v. *Farrell*, 126 F.3d 484, 493 (3d Cir. 1997) (Campbell, J., dissenting). "For example, a mother urging her son, in his own interest, to claim his Fifth Amendment right to remain silent would hardly be acting 'corruptly.'" *Ibid.*

[6] The court of appeals' affirmance of petitioner's conviction for corruptly persuading Eddy to destroy the "Jack" bonds does not in any way conflict with *Farrell*. Destroying evidence, like lying to the authorities, is not conduct protected by the Fifth Amendment, and it would not enjoy protection under *Farrell*'s rationale.

cause "the 'culpable conduct' that violates § 1512(b)(3)'s 'corruptly persuades' clause does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance with that right, from volunteering information to investigators." 126 F.3d at 488. Beyond that specific holding, the court stated that it was "hesitant to define in more abstract terms the boundaries of the conduct punishable under the somewhat ambiguous 'corruptly persuades' clause. [W]e do not think it necessary to provide such a definition here." *Ibid.*

The court in *Farrell*, however, suggested several boundaries on its holding. Initially, because the district court had "expressly found that Farrell did not employ coercive methods" to dissuade his co-conspirator from cooperating with investigators (*Farrell*, 126 F.3d at 489), the Third Circuit confined its holding to "noncoercive attempt[s]." *Id.* at 488. Moreover, the court held that if the defendant had attempted to persuade his co-conspirator to lie to federal investigators—rather than simply withhold information pursuant to a valid Fifth Amendment privilege—the defendant would have exhibited the culpable conduct necessary to be found guilty of violating 18 U.S.C. 1512(b). 126 F.3d at 488, 491. Finally, the court left open the question whether persuading a person to withhold information from federal investigators, when that person does not have a valid Fifth Amendment privilege to do so, would be covered by Section 1512(b)'s "corruptly persuades" clause. *Id.* at 489 n.3.

Those features of *Farrell* remove from the scope of the court's holding many of the characteristic situations prosecuted under Section 1512. Moreover, the court did

not address the extent to which the general obstruction-of-justice statute, 18 U.S.C. 1503, might apply to the facts at issue in *Farrell*. Accordingly, to the extent the court of appeals' rationale conflicts with the Third Circuit's opinion in *Farrell*, the disagreement is only a narrow one. Because the fact pattern implicating the courts' disagreement has arisen only in those two cases, the scope of any divergence between the Third Circuit and the other courts of appeals on this issue is not, as of yet, sufficiently pronounced as to warrant this Court's review.

2. Petitioner also contends (Pet. 6-11) that this Court should grant certiorari because Section 1512(b)'s "corruptly persuades" clause is unconstitutionally overbroad and vague. There is no conflict in the circuits on that issue. The Third Circuit in *Farrell* addressed only the statutory meaning of the phrase "corruptly persuades." The only other court of appeals' decision to have addressed the constitutionality of Section 1512(b) —*United States* v. *Thompson*, 76 F.3d at 452-453—held that Section 1512(b) is neither overbroad nor impermissibly vague.

Petitioner nevertheless contends (Pet. 9 n.6, 10 & n.7) that the court of appeals' decision conflicts "in principle" with the District of Columbia Circuit's opinion in *United States* v. *Poindexter*, 951 F.2d 369 (1991), cert. denied, 506 U.S. 1021 (1992), on the question whether the use of the word "corruptly" in a criminal statute is unconstitutionally vague. No such conflict exists. First, the court in *Poindexter* held that the word "corruptly" in 18 U.S.C. 1505 (1988)[7] was unconstitutionally

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[7] The version of Section 1505 at issue in *Poindexter* provided:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or

vague only as applied to the specific conduct of the defendant in that case—lying directly to Congress. 951 F.3d at 377, 379, 385. The court distinguished that conduct from the influencing *of another* to violate his legal duty to comply with a congressional inquiry, and it held that Section 1505 was unconstitutionally vague only as applied to a defendant who *himself* lies to Congress. *Id.* at 379, 381-382, 384; see *id.* at 385 ("[W]e need not conclude that the ambiguity of the term 'corruptly' in § 1505 renders that term unconstitutionally vague as applied to all conduct."). In contrast to the defendant in *Poindexter*, petitioner was found guilty of corruptly persuading *other persons*—Eddy and Kennedy—to destroy and withhold incriminating information. To the extent *Poindexter* is at all relevant, the decision is inapplicable to the conduct underlying petitioner's convictions.

Second, the court of appeals' decision in petitioner's case does not conflict with the opinion in *Poindexter* because the court in that case addressed a different statute—Section 1505. The court expressly distinguished Section 1503, the statute on which Section 1512(b) was modeled, stating that "the language of § 1505 is materially different from that of § 1503." 951 F.2d at 385. And, as noted by the court of appeals in petitioner's case (Pet. App. 22 n.22), the District of Columbia Circuit chose not to extend *Poindexter*'s holding

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> impedes or endeavors to influence, obstruct, or impede * * * the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress [s]hall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 1505 (1988).

to Section 1512(b) in *United States* v. *Morrison*, 98 F.3d 619 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1279 (1997). In that case, the court affirmed a defendant's conviction under Section 1512(b) for attempting to "corruptly persuade" another person to testify falsely in court. *Id.* at 629-630.

The court of appeals' holding that Section 1512(b) is not unconstitutionally overbroad or vague is correct. As the court explained, because the statute's application is limited to persuasion "motivated by an improper purpose," it "does not prohibit constitutionally protected speech, even if such conduct has the effect of hindering an investigation." Pet. App. 24; see *Thompson*, 76 F.3d at 452 ("By targeting only such persuasion as is 'corrupt[],' § 1512(b) does not proscribe * * * constitutionally protected speech and is not overbroad."). Likewise, the court correctly held (Pet. App. 22-23) that "corruptly"—defined to mean "with an improper purpose"—"is a scienter requirement which provides adequate notice of what conduct is proscribed."[8]

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[8] There is also no basis for petitioner's apparent suggestion (Pet. 7) that his conviction for corruptly persuading Kennedy not to talk to the FBI violated his rights under the Fifth Amendment. Although Kennedy could have asserted the Fifth Amendment privilege against compelled self-incrimination in response to questioning by the FBI, petitioner had no Fifth Amendment right to persuade her to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

Supreme Court, U.S.
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No. 98-837

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JESSE WOODROW SHOTTS,
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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THIS COURT SHOULD RESOLVE THE CONFLICT IN THE CIRCUITS OVER WHETHER THE TERM "CORRUPTLY PERSUADE" AS USED IN THE WITNESS TAMPERING STATUTE CRIMINALIZES PERSUASION UNACCOMPANIED BY THREATS, FORCE OR INTIMIDATION

This Petition asks this Court to resolve what the term "corruptly persuades" means when used in the "witness tampering" statute, 18 U.S.C. § 1512. Shotts was convicted of two counts of "witness tampering" – one, for telling an employee and co-conspirator, in response to her question about the FBI, that if she "just [did] not say anything [she] wasn't going to be bothered," and two, for instructing another employee to destroy bail bonds. In both cases, Shotts' statements were upheld as "corrupt persuasion," although there was no evidence that he threatened, coerced, intimidated or pressured either employee.

The government acknowledges that the Eleventh Circuit's decision in this case, which defines corrupt persuasion as any speech "motivated by an improper purpose" (App. 24), is "in tension" with the decision of the Third Circuit in United States v. Farrell, 126 F.3d 484 (3d Cir. 1997), which requires proof of culpable conduct. (Brief in Opp. at 7) The government also recognizes that Farrell, in turn, rejected the contrary interpretation the Second Circuit accorded the term

"corrupt persuasion" under 18 U.S.C. § 1503. United States v. Thompson, 76 F.3d 442 (2d Cir. 1996). Nevertheless, the government argues that the issue posed in this case is little more than a dispute over the weight of the evidence, complicated by a "narrow area of disagreement" over how a few words in a federal statute should be interpreted. (Brief in Opp. at 7) The issue is far more substantial than the government suggests.

The disagreement is not narrow, but profound, going to the very nature of what conduct is proscribed. The Second and Eleventh Circuits have held that all the government need show to establish the element of "corruption" is an improper motive. Under that broad reading of the "corrupt persuasion" language, virtually any speech "corruptly" motivated -- itself an extremely vague concept -- can be deemed a federal crime. It would permit a conviction in the very example given by the government – a mother urging her son to claim his Fifth Amendment right (Brief in Opp. at 8, n.5) – if the mother's purpose was to help her son by impeding the investigation into her son's activities.

In contrast, the Third Circuit has held that something more must be shown – that the government must prove some form of coercive or otherwise

culpable conduct.[1] Although the government seems to be implying that Farrell is somehow distinguishable from this case, both cases involve non-coercive statements to co-conspirators that they have no obligation to talk to the authorities. If Shotts were prosecuted in the Third Circuit, since the government put in no evidence of bribery or of coercive or intimidating conduct, his convictions for witness tampering could not be sustained.[2]

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[1] The Fifth Circuit has held that the term "corruptly" when used in 26 U.S.C. § 7212(a), is vague and overbroad if defined to mean "with improper motive on bad or evil purpose." United States v. Reeves, 752 F.2d 995 (5th Cir.), cert. denied, 474 U.S. 834 (1985). That suggests that, were the Fifth Circuit to be presented with interpreting the "corruptly persuade" language of § 1512, it would side with the Third Circuit. Moreover, the District of Columbia Circuit, in United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991), cert. denied, 506 U.S. 1021 (1992), while not addressing the precise question at issue here, found the word "immoral" too vague to survive constitutional scrutiny when used in a companion obstruction of justice statute.

[2] Despite the government's suggestion to the contrary, the Eleventh Circuit did not find any evidence of threats, force, or intimidation. As to Mr. Shotts' response to Ms. Kennedy's question about the FBI, all the Court concluded was that "while not

There is more than simply "tension" in the cases. There is a fundamental disagreement over what type of conduct is prohibited. Which interpretation of the "corrupt persuasion" provision is correct is undoubtedly an important question warranting this Court's review. At this very moment, the United States Senate is being asked to interpret and apply the very statute at issue in this Petition. Cheryl Mills, Deputy Counsel for the President, has advised the Senate that the United States Attorneys' Manual requires that, in a Section 1512 prosecution, the government prove "an effort to threaten, force, or intimidate another person," and "an intent to influence the person's testimony." As Ms. Mills explained it on the Senate floor, "'corruptly persuade' for career prosecutors requires some element of threat or intimidation or pressure." Transcript of Deputy Counsel Cheryl Mills' Statement on January 20, 1999. 1999 WL 20507 (F.D.C.H.)

If Ms. Mills correctly stated the Justice Department's view – a view that cannot be reconciled with its position in this case -- then, as a general policy

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overwhelming, the jury could reasonably have inferred ... that Shotts was attempting with an improper motive to persuade Kennedy not to talk to the FBI." (App. 26) And as to Kennedy's testimony that Shotts told another employee to destroy certain bail bonds, the Eleventh Circuit never even addressed whether Shotts' statement constituted "corrupt persuasion." (App. 26-28)

matter, the government agrees with the reasoning of Farrell. But, as this case amply demonstrates, not all prosecutors are complying with the Manual, the Justice Department itself does not adhere to its own policy, and some Circuits are allowing convictions to stand without proof of threats, force, or intimidation.

The government also misapprehends the First and Fifth Amendment rights at issue in this case. While Shotts may have had no Fifth Amendment right to persuade Kennedy not to speak to the authorities (Brief in Opp. at 12, n.8), he had a First Amendment right to answer Ms. Kennedy's question about what she should do by advising her of her Fifth Amendment right not to talk with the FBI. Both constitutional rights are clearly implicated when a person is convicted of a felony for doing nothing more than telling a co-conspirator that she need not talk to the authorities.

The "witness tampering" statute is broad, but it is not, and cannot be allowed to be, endlessly elastic. The words "corruptly persuade" must mean something more than simply speech with an improper purpose or else the statute will inevitably trespass on speech that is constitutionally protected. As the Senate trial of President Clinton demonstrates, the proper application of the "corruptly persuade" language is a recurring question of undeniable importance. This case, with its simple fact pattern and with the legal issues narrowed by the reversal of all the other convictions, presents the question its starkest form. This Court should take this

opportunity to resolve the conflict in the Circuits. The Petition for a Writ of Certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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